United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: December 16, 2003

TO : Richard L. Ahearn, Regional Director
Region 19

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Chenaga Power, LLC 524-5079-2800
Case 19-CA-28897 524-5079-2813
524-5079-2874

This case was submitted for advice as to whether the Employer unlawfully failed to return economic strikers to their previous positions upon an unconditional offer to return to work at the end of a strike.

We conclude that the Employer did not unlawfully refuse to return strikers to their previous positions because it had hired permanent striker replacements, whom it had no legal obligation to displace. Our conclusion is based in part on the fact that written offers of acceptance signed by the replacement employees supported the finding that the employees are permanent replacements, thus distinguishing this case from Target Rock Corp., 324 NLRB 373 (1973), enfd. 172 F.2d 921 (D.C. Cir. 1998).

FACTS

Since April 1, 2003,[1] Chenaga Power, LLC has operated an electrical power plant located on Elmendorf Air Force Base in Anchorage, Alaska. It succeeded a predecessor employer after the Air Force awarded it the contract to operate the power plant in 2002. Chenaga hired all of the predecessor's approximately 19 operations and maintenance personnel who have historically been represented by Charging Party IBEW Local Union 1547.

Although Chenaga hired the predecessor employees, it did not adopt their collective-bargaining agreement between the Union and the predecessor. During negotiations over a successor agreement, unit employees voted to strike in support of the Union's economic positions. Beginning on April 20, approximately 15 of the 19 unit employees went out on strike.

During the strike, the Employer sought replacements for the striking workers. It placed an advertisement in a local

[1] All dates are in 2003 unless specified otherwise.

Anchorage newspaper stating that Chenaga is recruiting employees in the affected positions, without making reference to the replacement employees' status as temporary or permanent employees. Chenaga also submitted announcements for replacement workers on the website of the State Department of Labor's Alaska Job Bank. The announcements list the duration of the jobs as "full time 31 to 150 days." A computerized listing by the Alaska Department of Labor's Juneau Job Center repeated the wording of the Alaska Job Bank announcements, and listed the jobs as "temp." Chenaga states that it listed the jobs as "full time 31 to 150 days" solely because it has a 90-day probationary period, and it did not want to list the jobs as "full time over 150 days" for fear of waiving a defense should it be sued by a probationary employee it discharged. Chenaga provided evidence that it had placed a similar job announcement with a similar duration period on the Alaska Job Bank's website in the past, prior to the strike.

Between August 21 and August 31, Chenaga hired 13 employees to replace the striking workers.[2] There is no evidence that any replacement employee was aware of the electronic job posting with the Alaska Job Bank or the Juneau Job Center.[3] However, Chenaga required each replacement employee to sign a written acceptance of the job offer. In part, the written offer states the following:

> ... employees and the company retain the right to terminate the employment relationship at will, at any time, with or without notice and with or without cause.
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> ...
>
> You are being hired to replace a striking employee. For the purpose of the National Labor Relations Act only, you are classified as a permanent replacement for that employee. That means that we intend to employ you as a 'regular' employee. You will not be terminated solely for the purpose of reinstating strikers whom you have replaced <u>unless</u> reinstatement of those strikers is required by, or agreed to as a part of a settlement with, the National Labor Relations

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[2] Chenaga also reinstated three strikers who asked to return to work during the strike.

[3] The Alaska Department of Labor evidently pulled the job posting from its website, citing regulations mandating that the State remain neutral during strikes.

> Board, a court of competent jurisdiction, or the provisions of a strike settlement agreement between the Company and the Union. (Emphasis in original.)

On August 27, the Union asked Chenaga whether it was hiring replacements for the strikers, and if so, whether they were permanent or temporary. Chenaga responded that it had been hiring, without characterizing the status of the replacements. On September 2, Chenaga wrote to the Union, stating that a striker had expressed a desire to return to work, but that it had no open position. It stated that it will place that employee on a preferential hiring list.

On September 2, the Union advised Chenaga that employees decided to end their strike and return to work. Chenaga responded that permanent replacements were employed in all unit positions previously held by strikers. Chenaga offered to discuss issues relating to a preferential hiring list.

On September 5, the parties entered into a collective-bargaining agreement for a three year period beginning on October 1. However, the parties reached no agreement about the opportunity for former strikers to return to work.

ACTION

We conclude that the Employer did not unlawfully refuse to return strikers to their previous positions because it had hired permanent striker replacements, whom it had no legal obligation to displace. Our conclusion is based in part on the fact that written offers of acceptance signed by the replacement employees supported the finding that the employees are permanent replacements, thus distinguishing this case from Target Rock Corp., 324 NLRB 373 (1973), enfd. 172 F.2d 921 (D.C. Cir. 1998).

An employer violates Section 8(a)(3) and (1) if it fails to reinstate strikers upon their unconditional offers to return to work, unless the employer can establish a "legitimate and substantial business justification" for failing to do so.[4] An employer's permanent replacement of economic strikers as a means of continuing its business operations during a strike is a legitimate and substantial business justification.[5] To meet its burden of proving the

[4] See NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 378 (1967).

[5] NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333, 345-346 (1938).

replacements' permanent status, the employer must establish "'that the replacements were hired in a manner that would show that the men [and women] who replaced the strikers were regarded by themselves and the [employer] as having received their jobs on a permanent basis.'"[6]

The touchstone of proving an employee's permanent status is that "[t]he employer's hiring offer must include a commitment that the replacement position is permanent and not merely a temporary expedient subject to cancellation if the employer so chooses."[7] Thus, an employer's representations that fail to provide "unequivocal assurance to the replacements that their employment was permanent," or are "susceptible to different interpretations," do not "establish a mutual understanding that replacements were hired as permanent employees."[8]

In Target Rock Corporation,[9] the Board found that the employer's periodic use of the term "permanent" in its communications with the replacement employees did not overcome the ambiguity created in the employer's other communications indicating that it never intended them to become permanent. Replacements were hired in response to ads, which provided that "[a]ll positions could lead to permanent full-time after the strike." The Board found that the ads created a "reasonable basis for believing that the jobs were not permanent and that a determination as to whether they could become permanent employees was to be deferred until the strike ended."[10] After being hired, replacements were told that "you are considered permanent, at-will employees unless the NLRB considers you otherwise, or a settlement with the Union alters your status to temporary replacement." The Board concluded that this post-hire statement that employees were at will was a "mere

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[6] Consolidated Delivery & Logistics, 337 NLRB 524, 526 (2002), enfd. mem. 2003 WL 21180437 (2003), quoting Target Rock Corp., 324 NLRB at 373.

[7] Covington Furniture Mfg. Corp., 212 NLRB 214, 220 (1974), enfd. 514 F.2d 995 (6th Cir. 1975).

[8] Gibson Greetings, Inc., 310 NLRB 1286, 1290-91 (1993), enfd. in part, remanded in part 53 F.3d 385 (D.C. Cir. 1995).

[9] 324 NLRB at 374-75.

[10] Id. at 373-74.

invocation of the same equivocal language" which had made the terms of hire ambiguous.[11] Thus, the Board concluded that the employer and the employees "did not share any mutual understanding that the replacements were hired as permanent employees."[12]

We conclude that the evidence establishes that Chenaga and the replacement employees shared an unambiguous mutual understanding that the replacement employees were hired on a permanent basis. First, the "at will" language in the replacements' acceptance letter is distinguishable from ambiguous language in Target Rock. Chenaga's acceptance letter, signed by all replacements, states, as in Target Rock, that employment is "at will." However, Chenaga's letter significantly adds that each new hire is "classified as a permanent replacement" for a striker, and that Chenaga "intend[s] to employ you as a 'regular' employee." We conclude that Chenaga resolved any ambiguity that may be inherent in the term "at will" by specifically stating in the same document that the employee is a "permanent replacement and defining what that meant and how it is reconciled with the "at will" statement."[13]

Secondly, in this case, unlike Target Rock, no other statement exists to deprive Chenaga and its replacement employees of the mutual understanding that replacements were hired on a permanent basis. Although the electronic job advertisement through the State of Alaska identified the

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[11] Id. at 375.

[12] Id. at 375.

[13] Compare also Jones Plastic & Engineering Company, LLC Camden Div, Case 26-CA-20861, Advice Memorandum issued January 10, 2003, in which complaint was authorized pursuant to the majority opinion in Target Rock. In Jones Plastic, the replacements' job acceptance letter, like the statement to replacements in Target Rock, characterized employment as at will without unambiguously providing that new hires are "permanent replacements" or explaining what permanent status meant. [*FOIA Exemptions 2, 5 and 7(e)*

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position as "full time from 30 to 151 days," there is no evidence that any replacement was aware of this ad. Nor does the wording of the ad indicate ambiguity in Chenaga's mind, since it is uncontroverted that Chenaga routinely advertises vacancies for all permanent positions on the Alaska Job Bank's website in this manner in order to protect itself from potential contractual claims from terminated probationary employees.

Since striking employees have been permanently replaced, Chenaga did not unlawfully refuse to reinstate them. Accordingly, the Region should dismiss this charge, absent withdrawal.

B.J.K.